IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.862 OF 2006
IN
NOTICE OF MOTION NO.3232 OF 2006
IN
L.C.SUIT NO.1073 OF 2006
WITH
CIVIL APPLICATION NO.1198 OF 2006

Chandu Tulsidas Pahuja ...Appellant

Versus

Municipal Corpn. of Gr. Mumbai ...Respondent

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Mr.S.M.Sakhardande with Mr.P.N.Kulkarni for Appellant.

Mrs.Geeta Joglekar for Respondent.

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CORAM: A.M.KHANWILKAR, J.

MARCH 2, 2007.

P.C.

1. Heard Counsel for the parties.

2. Admit. Mrs.Joglekar waives notice for Respondent.

3. As short question is involved, matter is heard for final disposal forthwith by consent.

4. This Appeal from Order takes exception to the Judgment and Order passed by the City Civil Court, Greater Mumbai dated 21st November 2006 in Notice of Motion No.3232 of 2006 in L.C.Suit No.1037 of 2006. By this order, the Trial Court has dismissed the Notice of Motion preferred by the Appellant/Plaintiff for interim relief during the pendency of the Suit. Following interim relief was claimed by the Appellant:

> "(a) That pending the hearing and final disposal of the suit, the Defendants, their agents, servants, Officers representatives and/or any person or persons claiming through them be restrained by an Order and injunction of this Hon'ble Court, from demolishing and/or removing and/or pulling down, the alleged unauthorised construction of Toilet admeasuring about 2'10" X 4'-6" (3' X 4.10" mentioned in the Notice U/s.351) in the suit premises in pursuance of Notice U/s.351 of B.M.C.Act, dated 23.7.05; bearing No.ACPN/BF-II/351/3291/05-06, and Order dated 20.1.06 bearing No.ACPN/BF/II/351/3291/05-06, i.e. Flat No.603/C Wing, Ecershine Nagar, Atlanta CHS Ltd., Malad (W), Mumbai 400 064;
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> (b) That ad-interim reliefs in terms of prayer (a) above;
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> (c) Costs of this Notice of Motion be provided for;
>
> (d) Such other and further reliefs as the

nature and circumstances of the case may require."

5. The Appellant had filed Suit before the Trial Court, essentially challenging the notice issued by the Corporation under Section 351 of the Mumbai Municipal Corporation Act in relation to stated unauthorised construction of toilet in open passage admeasuring 3’ x 4’ as shown in the rough sketch. In the rough sketch, the toilet is shown at the end of the passage, abutting the kitchen of the flat. The Trial Court has found that the offending 2nd toilet block shaded in red ink is in open passage of the site which is *per se* unauthorised construction, as no construction in open passage is permitted as per the Development Control Rules.

6. During the hearing of this Appeal, some controversy was raised about the correctness of the rough sketch provided in the notice under Section 351 of the Act, when juxtaposed with the copy of the sanctioned plan, which was produced by the Corporation before the Trial Court. To put this controversy at rest, the Official of the

Corporation was directed to do site inspection and produce the report giving description of the premises. That has now been done by the Official of the Corporation.

7. From the report dated 14th February 2007 submitted before this Court, it is seen that the description of the premises in occupation of the Appellant is consistent with the description of the premises given in the rough sketch accompanying the notice under Section 351 of the Act. In the report, it is clearly mentioned that one bedroom which was following the kitchen, has been included in the neighbouring flat. The passage near the kitchen has been closed by erecting the offending structure at the end of that passage.

8. Suffice it to observe that the premises on site are not in the same form as mentioned in the sanctioned plan relied by the Corporation. The Corporation is not in a position to explain as to how completion certificate and occupation certificate has been issued in respect of such

building, inspite of such inconsistency. It is the case of the Corporation that the alterations must have been made by the Appellant after the completion and occupation certificate in respect of the building in question came to be issued. It is not necessary for me to examine this aspect of the matter. The Corporation will be free to take such action as may be warranted in that behalf.

9. Suffice it to observe that the offending structure (additional toilet block referred to in the suit notice) is not consistent with the sanction plan. To that extent, no fault can be found with the finding reached by the Trial Court. On that view, the Appeal should fail.

10. However, the Appellant would contend that the Appellant may be permitted to apply for regularisation of the suit structure. Counsel for the Corporation, on instructions, submits that regularisation of such structure may be possible, however, that aspect will have to be considered by the competent Authority. Counsel for the Corporation also points out that suit notice has

been issued pursuant to the complaint lodged by the flat user of flat No.503 on the 5th floor, which is below the suit flat. The complaint was about leakage on account of the erection of offending structure. If it is so, the competent Authority before whom application for regularisation of the suit structure is made, shall have to give notice to the said party as well as the Society before taking any final decision.

11. The Appellant shall file application for regularisation before Executive Engineer, Building Proposal, Western Suburbs, within four weeks from today. On receipt of the said Application, the said Authority shall call upon the occupant of Flat No.503 as well as the Society to file its say and after considering all the relevant aspects, may pass such order, as may be warranted in the fact situation of the case and permissible by law. The entire exercise shall be completed not later than twelve weeks from today.

12. Till such time, no precipitative steps be taken by the Corporation in respect of the suit

structure.

13. It is, however, made clear that if the Appellant fails to file application for regularisation within the specified time as aforesaid, the Corporation will be free to take necessary action against the suit structure in accordance with law forthwith.

14. The Competent Authority before whom regularisation application is made, shall consider the same on its own merits, uninfluenced by the observations in the impugned order or for that matter, present order.

15. If the order passed by the Competent Authority is adverse, the same shall not be given effect to for a period of two weeks to enable the Appellant to take up matter before appropriate forum, as may be advised.

16. Appeal from Order and the companion Civil Application stand disposed of accordingly.

A.M.KHANWILKAR, J.